

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 CMI CAPITAL MARKET INVESTMENT,
4 LLC, et al.,

5 Plaintiffs,

6 CIVIL NO. 04-1638 (RLA)

7 v.

8 MUNICIPALITY OF BAYAMON,
9 et al.,

10 Defendants.

11 **ORDER DISMISSING COUNTS I, II AND III OF THE COMPLAINT
12 ASSERTED AGAINST THE MUNICIPALITY OF BAYAMON**

13 Plaintiffs¹ instituted these proceedings against the Government
14 Development Bank ("GDB" or "the Bank")² and the Municipality of
15 Bayamón ("Bayamón" "Municipality") seeking to collect payment and/or
16 for damages based on three finance lease agreements entered into by
17 two agencies of the Puerto Rico Government³ and by codefendant the
18 Municipality of Bayamón handled by a Mr. Alvin Aguirre, and/or
19 companies operated by him, including AA Public Finance Co., Inc.,

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¹ Named plaintiffs are: CMI Capital Market Investment, L.L.C.
21 ("CMI"), Wilmington Trust Company, as trustee of the PR Tax Exempt
22 Lease Certificate Trust 2002 Series A ("Wilmington"), and investors
23 Richard J. Schmeelk ("Schmeelk"), William B. Finneman and JIRA
24 Associates limited Partnership (collectively referred to herein as
25 "Plaintiffs").

26 ² The claims asserted against the GDB have been previously
27 dismissed. See, Order Dismissing Claims Asserted against the
28 Government Development Bank (docket No. 68) and Order Denying Motion
29 for Reconsideration issued on this date.

30 ³ These are the Puerto Rico Office of Courts Administration (by
31 its Spanish acronym, "OAT") and the Puerto Rico Consumer Affairs
32 Department (by its Spanish acronym, "DACO").

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3 (hereinafter jointly referred to as "AA"), and eventually assigned by
4 AA to the Plaintiffs.

5 The Municipality has moved for summary judgment alleging that it
6 never authorized any such assignment to plaintiffs herein and that
7 the underlying documents evidencing such a transaction are false and
8 fraudulent. Plaintiffs' response is basically that summary judgment
9 is premature and that discovery is warranted instead under Rule 56(f)
Fed. R. Civ. P.

10 **RULE 56(f)**

11 Parties wishing to conduct discovery prior to responding to
12 summary judgment requests must comply with the provisions of Rule
13 56(f) Fed. R. Civ. P. which reads:

14 Should it appear from the affidavits⁴ of a party opposing
15 the motion that the party cannot for reasons stated present
16 by affidavit facts essential to justify the party's
17 opposition, the court may ... order a continuance to permit
18 affidavits to be obtained or depositions to be taken or
19 discovery to be had....

20 The Municipality objected to plaintiffs' request pointing to a
21 procedural deficiency in that the Rule 56(f) petition was not
22 presented via an affidavit as provided for in the aforementioned
23 provision. However, it has been held that a sworn statement is not
24 indispensable provided that the "statement... [is] made, if not by

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26 ⁴ Plaintiff failed to submit a sworn statement validating her
reasons for the request.

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2 affidavit, then in some authoritative manner - say, by the party
3 under penalty of perjury or by written representations of counsel
4 subject to the strictures of Fed. R. Civ. P. 11". Vargas-Ruiz v.
5 Golden Arch Dev., Inc., 368 F.3d 1, 4 (1st Cir. 2004) (citing
6 Paterson-Leitch co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985,
7 988 (1st Cir. 1988)). See also, Velez v. Awning Windows, Inc., 375
8 F.3d 35, 40 (1st Cir. 2004).

9 "To benefit from the protections of Rule 56(f), a litigant
10 ordinarily must furnish the *nisi prius* court with a timely statement
11 - if not by affidavit, then in some other authoritative manner that
12 (i) explains his or her current inability to adduce the facts
13 essential to filing an opposition, (ii) provides a plausible basis
14 for believing that the sought-after facts can be assembled within a
15 reasonable time, and (iii) indicates how those factors would
16 influence the outcome of the pending summary judgment motion." Velez,
17 375 F.3d at 40. See also, Hernandez-Santiago v. Ecolab, Inc., 397
18 F.3d 30, 34-35 (1st Cir. 2005) (need to identify discovery demanded
19 and explain its relevancy).

20 The rule requires petitioner to identify for the court the
21 particular discovery it wishes to conduct as well as present credible
22 grounds to conclude that the information sought, if available, would
23 prove crucial in contesting material facts propounded by the summary
24 judgment proponent. "[T]he requested discovery [must] be capable of
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2 influencing the outcome of the motion for summary judgment." Adorno
3 v. Crowley Towing and Transp. Co., 443 F.3d 122, 128 (1st Cir. 2006).
4 Rule 56(f) mandates that the proponent "articulate some plausible
5 basis to support a belief that discoverable material exists which, if
6 available, would suffice to raise a trialworthy issue." Filiatralult
7 v. Comverse Technology, Inc., 275 F.3d 131, 138 (1st Cir. 2001).
8 "[T]he moving papers must contain a proffer which, at a bare minimum,
9 articulates a plausible basis for the movant's belief that previously
10 undisclosed or undocumented facts exist, that those facts can be
11 secured by further discovery, and that, if obtained, there is some
12 credible prospect that the new evidence will create a trialworthy
13 issue." Mass. School of Law at Andover, Inc. v. American Bar
14 Association, 142 F.3d 26, 44 (1st Cir. 1998). "To receive the benefit
15 of Rule 56(f), the movant must (1) articulate a plausible basis for
16 the belief that discoverable materials exist which would raise a
17 trial worthy issue, and (2) demonstrate good cause for failure to
18 have conducted the discovery earlier." Fennell v. First Step
19 Designs, Ltd., 83 F.3d 526, 531 (1st Cir. 1996) (internal quotations
20 and citations omitted).

21 Central to this rule's applicability is the proponent's due
22 diligence in the judicial proceedings. Ayala-Gerena v. Bristol Myers-
23 Squibb Co., 95 F.3d 86, 93 (1st Cir. 1996). "To savor the balm of Rule
24 56(f), a party must act in a timely fashion." Mass. School of Law,
25 142 F.3d at 44. Additionally, "the motion must set forth good cause
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3 to explain the movant's failure to have conducted the desired
4 discovery at an earlier date." *Id.*

5 There are a total of four (4) causes of action alleged against
6 Bayamón in these proceedings. These are: Count I - Declaratory
7 Judgment, Count II - Collection of Monies, Count III - Breach of
8 Contract and Count VI - Investors' Damage. We shall proceed to
9 closely analyze each one of them in light of the arguments presented
10 by both sides to the controversy to ascertain whether or not
additional time should be allowed for discovery.

11 **Count I - Declaratory Judgment**

12 In this particular claim plaintiffs pray for the court to
13 determine "(a) that [they] are the rightful assignees and only
14 parties entitled to receive payments under the Municipality's lease,
15 and (b) that the Municipality's unlawful payment to another party is
16 a material breach of the lease and its assignment, and is an event of
17 default".⁵

18 In support thereof, plaintiffs allege that they are the lawful
19 assignees of the lease in controversy;⁶ that Aguirre, as the
20 Municipality's agent, warranted its validity;⁷ that despite having
21 agreed to the assignments in writing⁸ the Municipality caused payment

23 ⁵ Complaint ¶ 48.

24 ⁶ Complaint ¶ 44.

25 ⁷ Complaint ¶ 45.

26 ⁸ Complaint ¶ 46.

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3 thereof to be made to AA which no longer had any right over those
4 monies.⁹

5 **Count II - Collection of Monies**

6 In Count II plaintiffs, as purportedly rightful owners of the
7 lease, demand payment of monies allegedly due thereunder.

8 **Count III - Breach of Contract**

9 Plaintiffs charge that the Municipality breached its duty to
10 make payments due under the leases assigned to them and demand
11 payment of the monies due as well as damages resulting from the
breach.

12 **Count VI - Investors' Damage**

13 The nature of this last cause of action varies from the previous
14 three in that it is predicated on different grounds. Essentially,
15 plaintiffs contend that the Municipality disregarded controlling
16 legal and regulatory provisions in the approval of the lease in
17 question as well as failed to establish the necessary safeguards for
18 the subsequent handling of the lease in question which led to the
19 fraudulent conduct on the part of AA.

20 **MOTION FOR SUMMARY JUDGMENT**

21 In their summary judgment request the Municipality has presented
22 evidence to establish that: the lease contract specifically
23 prohibited its assignment; the signatures of the alleged municipal
24 officers consenting to the assignments are fraudulent; the

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26 ⁹ Complaint ¶ 47.

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3 assignments were never recorded with either the Municipality or the
4 Comptroller's Office and when Bayamón paid the monies due under the
5 contract it had no prior notice of the alleged assignments.

6 As grounds for their Rule 56(f) petition plaintiffs contend that
7 they are not in a position to defend because, "it was not until
8 [Bayamón's] January 13th Motion that Plaintiffs learned for the first
9 time Bayamón's position regarding... the allegation that the
10 representative's signature found in the November 26th, 2006 [sic]
11 Acknowledgments of Assignment... are [sic] fraudulent and/or forged.
12 Moreover, until that date, Plaintiffs were completely unaware of the
13 fact that Bayamón had requested an investigation to [sic] the Federal
14 Bureau of Investigations (the "FBI") regarding the assignment of the
15 CAF and another supposedly fraudulent financial document, all related
16 to AA."¹⁰

17 However, at least by **January 26, 2004** - six months prior to
18 instituting this suit¹¹ - and in response to inquiries from
19 plaintiffs' own counsel, the Municipality specifically alerted
20 plaintiffs to the fact that: the lease could not be assigned; there
21 was no written consent for the assignment; the signature on the
22 assignment documents was not valid, and payment could not be made as
23 requested because the totality of the lease had been paid in May

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25 ¹⁰ Objection to Bayamon's Motion for Summary Judgment (docket
No. 89) pp. 5-6.

26 ¹¹ The complaint was filed on June 25, 2004.

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3 2002. This letter further forewarned plaintiffs' counsel that based
4 on their inquiries, the matter had been referred to the FBI.

5 Subsequently, on June 11, 2004, counsel for the Municipality
6 reiterated to the attorneys representing plaintiffs the reasons why
7 payment was not legally feasible and also offered them all
8 information available to the Municipality. In pertinent part, the
letter reads:

9 As per our telephone conversation, I hereby ratify our
10 disposition to meet with you in Puerto Rico and share all
11 the information we have related to AA Public Finance.

12 The Municipality of Bayamón cannot make any payments
13 in favor of your client, inasmuch [as] the documents of the
14 alleged assignment of the lease are fraudulent. The
15 totality of the lease was paid to AA Public Finance on
16 [sic] May 2002...

17 Nevertheless, the Mayor, Hon. Ramón Luis Rivera Cruz,
18 has instructed us to provide to CMI all the information
19 that could help CMI to collect from AA Public Finance Co.,
20 Inc.

21 Lastly, on August 20, 2004 plaintiffs' counsel requested a
22 certified contract of the lease contract.

23 Based on the foregoing, we reject plaintiffs' argument of
24 surprise regarding the fraud surrounding the assignments and
25 unavailability of information in this regard. All pertinent
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2 documentation related to the claims for declaratory judgment,
3 collection of monies and breach of contract have been laid out in the
4 record and we cannot anticipate nor have plaintiffs advanced what
5 possible additional information could be elicited by way of discovery
6 to defeat the summary judgment petition insofar as these three causes
7 of action are concerned.

8 Accordingly, we fail to see any reason not to proceed to rule on
9 the pending summary judgment request with respect to Counts I, II and
10 III of the complaint.

11 On the other hand, inasmuch as the Municipality's summary
12 judgment motion does not address the merits of Count VI claiming
13 investors' damage we need not dispose of this particular cause of
14 action which, in turn, renders moot any Rule 56(f) argument addressed
15 to this specific claim.

16 **SUMMARY JUDGMENT STANDARD**

17 Rule 56(c) Fed. R. Civ. P., which sets forth the standard for
18 ruling on summary judgment motions, in pertinent part provides that
19 they shall be granted "if the pleadings, depositions, answers to
20 interrogatories, and admissions on file, together with the
21 affidavits, if any, show that there is no genuine issue as to any
22 material fact and that the moving party is entitled to a judgment as
23 a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st
24 Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir.
25 1999). The party seeking summary judgment must first demonstrate the
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2 absence of a genuine issue of material fact in the record.
3 DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine
4 issue exists if there is sufficient evidence supporting the claimed
5 factual disputes to require a trial. Morris v. Gov't Dev. Bank of
6 Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.
7 Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S.
8 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if
9 it might affect the outcome of a lawsuit under the governing law.
10 Morrissey v. Boston Five Cents Sav. Bank, 54 F. 3d 27, 31 (1st Cir.
11 1995).

12 "In ruling on a motion for summary judgment, the court must view
13 'the facts in the light most favorable to the non-moving party,
14 drawing all reasonable inferences in that party's favor.'" Poulis-
15 Minott v. Smith, 388 F.3d 354, 361 (1st Cir. 2004) (citing Barbour v.
16 Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995)).

17 Credibility issues fall outside the scope of summary judgment.
18 "'Credibility determinations, the weighing of the evidence, and the
19 drawing of legitimate inferences from the facts are jury functions,
20 not those of a judge.'" Reeves v. Sanderson Plumbing Prods., Inc.,
21 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing
22 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505,
23 91 L.Ed.2d 202 (1986)). See also, Dominguez-Cruz v. Suttle Caribe,
24 Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("court should not engage in
25 credibility assessments."); Simas v. First Citizens' Fed. Credit
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2 Union, 170 F.3d 37, 49 (1st Cir. 1999) ("credibility determinations
3 are for the factfinder at trial, not for the court at summary
4 judgment."); Perez-Trujillo v. Volvo Car Corp., 137 F.3d 50, 54 (1st
5 Cir. 1998) (credibility issues not proper on summary judgment);
6 Molina Quintero v. Caribe G.E. Power Breakers, Inc., 234 F.Supp.2d
7 108, 113 (D.P.R. 2002). "There is no room for credibility
8 determinations, no room for the measured weighing of conflicting
9 evidence such as the trial process entails, and no room for the judge
10 to superimpose his own ideas of probability and likelihood. In fact,
11 only if the record, viewed in this manner and without regard to
12 credibility determinations, reveals no genuine issue as to any
13 material fact may the court enter summary judgment.". Cruz-Baez v.
14 Negron-Irizarry, 360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal
15 citations, brackets and quotation marks omitted).

16 In cases where the non-movant party bears the ultimate burden of
17 proof, he must present definite and competent evidence to rebut a
18 motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477
19 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; Navarro v. Pfizer
20 Corp., 261 F.3d 90, 94 (1st Cir. 2000); Grant's Dairy v. Comm'r of
21 Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely
22 upon "conclusory allegations, improbable inferences, and unsupported
23 speculation". Lopez -Carrasquillo v. Rubianes, 230 F.3d 409, 412 (1st
24 Cir. 2000); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581
25 (1st Cir. 1994); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d
26 5, 8 (1st Cir. 1990).

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3 THE FACTS

4 We find the following facts relevant to Claims I, II and III are
uncontested:

- 5 1. On **September 21, 2001**, Bayamón, as lessee, entered into a
6 Municipal Lease Agreement (Lease No. MPR-010477) with AA,
7 as lessor.
- 8 2. Lease No. MPR-010477, subscribed by the Municipality and
9 AA, was recorded with the Puerto Rico Comptroller's Office
10 on **September 21, 2001**.
- 11 3. The lease agreement specifically disallowed assignments of
12 the contract by AA. In this respect, Art XI, sec. 11.1 of
13 the contract provided: "This Lease Agreement, and the
14 obligations of Lessee [Municipality] to make payments
15 hereunder, **may not be assigned by Lessor** [AA]."
16 (Emphasis ours).
- 17 4. Payment under the terms of the lease agreement were due by
18 the Municipality as follows:

Date	Amount
On 9/21/01 ¹²	\$822,331.34
On or before 9/30/02	\$924,680.63
On or before 9/30/03	\$924,680.63
On or before 9/30/04	\$924,680.63

26 ¹² Date of execution of the agreement.

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- 2 5. On **November 20, 2001**, AA assigned the lease to plaintiff
3 CMI without Bayamón's knowledge or consent.
- 4 6. On **November 26, 2001**, CMI, in turn, assigned the lease to
5 the plaintiff-investors without Bayamón's knowledge or
6 consent.
- 7 7. On **November 26, 2001**, AA, CMI and the plaintiff-investors
8 signed individual documents entitled Acknowledgment of
9 Assignment.
- 10 8. Each Acknowledgment of Assignment also appears signed on
11 behalf of the lessee Municipality but the name of the
12 signatory is illegible.
- 13 9. The title of the person signing on behalf of the
14 Municipality does not appear in any of the Acknowledgments.
- 15 10. The signature of the person allegedly subscribing the
16 Acknowledgments on behalf of Bayamón is not registered in
17 the Municipal records "nor does [it] look[] like any
18 signature registered within [the municipal] records, for
19 the year 2001." January 12, 2006 Certification by Ms. María
20 Muñoz Rovira, Municipal Secretary.
- 21 11. The aforementioned Acknowledgments of Assignment were never
22 registered either with the Municipality nor with the Puerto
23 Rico Comptroller's Office.
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2 12. On January 31, 2002 AA certified the cancellation balance
3 due on the lease which was subsequently recalculated by the
4 Municipality as **\$2,699,404.13 as of May 15, 2002.**

5 13. On **April 18, 2002**, the Bayamón Municipal Assembly approved
6 the issuance of bonds in the amount of \$6,975,000.00 which
7 was signed by the Mayor on that same date. Among the
8 purposes of the Resolution was to refinance the balance of
9 the lease agreement for the Lease Agreement.

10 14. On **May 23, 2002** the Municipality issued a check made
11 payable to AA in the amount of **\$20,782.46.**

12 15. On **May 24, 2002** the Municipality issued a check made
13 payable to AA in the amount of **\$2,678,621.67.**

14 16. On **June 11, 2003** CMI notified the Municipality in writing
15 of the assignment by AA and that payment due under the
16 lease agreement should be made in its favor commencing on
17 **September 24, 2003.**

18 **PUERTO RICO LEGAL PROVISIONS**

19 In Puerto Rico, in order for a contract to be valid, three
20 elements must coincide: (1) the consent of the contracting parties,
21 (2) an object subject of the contract and (3) cause for the
22 obligation being contracted by the parties. Art. 1213 of the P.R.
23 Civ. Code, P.R. Laws Ann. tit. 31, § 3391 (1990). Garriga, Hijo, Inc.
24 v. Cond. Marbella, 143 D.P.R. 927, 933 n.3 (1997). See also, APA
25 Int'l Film Distrib., Inc. v. Corp. de P.R. para la Difusion Publica,
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2 394 F.Supp.2d 443, 450 (D.P.R. 2005) ("a contract has three requisite
3 elements for its formation, and are binding as long as the essential
4 conditions required for their validity exist."); Caraballo Cordero v.
5 Banco Financiero de P.R., 208 F.Supp.2d 185, 189 (D.P.R. 2002)
6 ("Under Puerto Rico law a contract comes into existence" when [these
7 three elements are present). "[T]here is no contract unless
8 [these]... requisites exist". Garita Hotel Ltd. P'ship v. Ponce Fed.
9 Bank, F.S.B., 954 F.Supp. 438, 448 (D.P.R. 1996).

10 It is undisputed that in the case presently before us the
11 consent of the Municipality to the purported assignments - a
12 mandatory legal condition for its validity - is lacking. The
13 documents purportedly evincing Bayamón's approval to the transfer of
14 rights were forgeries apparently generated by AA and thus, have no
15 legal effect upon the Municipality. See, Soto v. Rivera, 144 D.P.R.
16 500, 514 n.3 (1997) (absent the required consent, the contract is
17 null and void and has no validity whatsoever).

18 Accordingly, plaintiffs may not properly claim a declaratory
19 judgment, breach of contract, or seek to collect monies thereunder
20 against the Municipality.

21 It is also important to note that the Lease Agreement
22 specifically prohibited assignments. Thus, at all times, plaintiffs
23 were apprised of this restriction. Further, there is no evidence that
24 Bayamón was notified of the alleged assignments prior to liquidating
25 the sums due AA in May of 2002. No proof has been submitted to
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2 controvert the fact that plaintiffs first advised the Municipality of
3 their alleged rights to these funds over one year after payment of
4 the entire sum had already been effected.

5 Lastly, the purported acknowledgments of the assignments between
6 plaintiffs and AA were never registered either at the Municipality¹³
7 or at the Comptroller's Office¹⁴ as mandated by law. Specifically,
8 P.R. Ann. tit. 2, § 97(d) (supp. 2006) precludes payment under any
9 contract which has not been registered in accordance with the
10 provisions of the statute. See also, Ortiz v. Mun. de Guayama, 2004
11 TSPR 166 (contracting parties may not demand execution of contract
12 provisions until the contract has been registered with the
13 Comptroller as required by law).

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18 ¹³ In pertinent part, P.R. Laws Ann. tit. 21, § 4366 (2005)
19 provides:

20 The municipalities shall keep a record of all
21 contracts granted, including the amendments thereto, and
shall remit a copy of them... to the Office of the
Comptroller.

22 ¹⁴ In pertinent part, P.R. Laws Ann. tit. 2, § 97 (supp. 2006)
23 provides:

24 (a) The... municipalities of the Commonwealth of
25 Puerto Rico, with no exception whatsoever, shall keep a
registry of all contracts executed, including amendments
thereto, and shall remit a copy thereof to the Office of
the Comptroller within fifteen (15) days following the date
26 of the execution or amendment of the contract.

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2 **CONCLUSION**3 Based on the foregoing, the Motion for Summary Judgment filed by
4 Bayamón (docket No. **62**) is **GRANTED** with respect to Counts I, II and
5 III of the complaint which are hereby **DISMISSED**.¹⁵

6 Judgment shall be entered accordingly.

7 IT IS SO ORDERED.

8 San Juan, Puerto Rico, this 31st day of October, 2006.9
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S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge
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¹⁵ See, Objection (docket No. **89**) and Reply (docket No. **96**).